United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

77-7237

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRITISH AIRWAYS BOARD and
COMPAGNIE NATIONALE AIR FRANCE,

Plaintiffs-Appellees,

v.

THE PORT AUTHORITY OF NEW YORK
AND NEW JERSEY, et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PORT AUTHORITY DEFENDANTS-APPELLANTS IN REPLY TO THE BRIEF FOR THE UNITED STATES, AMICUS CURIAE

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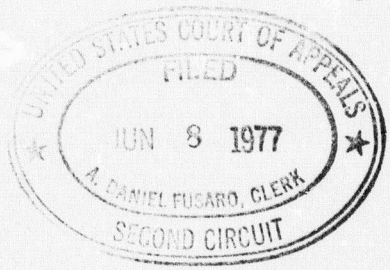
New York, New York
June 8, 1977



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- -X

BRITISH AIRWAYS BOARD and :
COMPAGNIE NATIONALE AIR FRANCE,
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Plaintiffs-Appellees,
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Defendants-Appellants. :

- -X

BRIEF OF PORT AUTHORITY DEFENDANTS-
APPELLANTS IN REPLY TO THE
BRIEF FOR THE UNITED STATES, AMICUS CURIAE

We are gratified that the United States in its brief amicus curiae agrees with the position of the Port Authority defendants-appellants that:

1. Under the existing statutory framework Congress did not intend to provide, and the Executive did not intend to exercise, the power to preempt an airport proprietor from excluding any aircraft on the basis of noise considerations; and

2. Secretary Coleman's action in authorizing the Concorde demonstration at JFK did not preempt the Port Authority from its traditional role as an airport proprietor.

We are, however, shocked and disappointed that the United States has seen fit to treat this Court's request that it

address the three legal issues involved in this appeal as a license to make a wholly unwarranted and factually unsupportable attack on the Commissioners of the Port Authority for not having authorized Concorde operations at JFK.

Unable to support in any respect the reasoning of the Court below, the United States nevertheless asks this Court to affirm the decision of the District Court. In so doing it seeks to interject on this appeal contentions based upon factual allegations which are not involved in the airlines' motion for summary judgment and which have no basis in the record in this proceeding. In our opinion, the Government's attempt to so do is highly improper. We will, therefore, not attempt herein to refute the unfair and untrue charges made by the United States. We will instead demonstrate that the issues raised in the Government's brief cannot and should not be resolved on this appeal.

In its brief, the United States argues that the Port Authority's resolution of March 11, 1976, imposing a temporary ban on Concorde operations at JFK should be invalidated by this Court because "the Port Authority's proprietary powers may have been exercised in a discriminatory fashion." (Brief for the United States, p.5). Unjust discrimination is, of course, a factual issue which can be decided by a court only after a proper adversary record has been developed. It cannot and should not be disposed of by an appellate court for the first time on appeal on

a motion for summary judgment which does not involve that issue. Fountain v. Filson, 336 U.S. 681, 683- (1949); Meetings & Expositions, Inc. v. Tandy Corporation, 490 F. 2d 714, 716-7 (2d Cir. 1974); Mariash v. Morrill, 496 F. 2d 1138, 1145 (2d Cir. 1974); and Heirs of Fruge v. Blood Services, 506 F. 2d 841, 844, fn. 2 (5th Cir. 1975).

In this regard, it is highly significant that the issue of discrimination although raised in the airlines' complaint was not pursued in either of their two motions for summary judgment, the latest of which was made on December 20, 1976. Obviously the airlines believed that the charge of unjust discrimination could not be sustained.

The United States has attempted to support its charge of unjust discrimination by gratuitously asserting that "it is our understanding that subsonic aircraft regularly violate the 112 PNdB limit [the Port Authority's noise standard for subsonic jet aircraft] without being denied future access to JFK or other sanctions." (Brief for the United States, p. 24). The Government does not attempt to substantiate this "understanding" and indeed could not do so.

Finally, the United States asks this Court to rule that the Port Authority has exercised its proprietary powers in a dilatory, arbitrary and unreasonable fashion because, it contends, the Port Authority has "ignored its own resolution of March 11, 1976 to assess and report in a timely fashion upon

Concorde noise as that data became available from operations elsewhere." (Brief for the United States, p. 5). Yet the United States is well aware that the Port Authority Commissioners postponed a scheduled consideration of the Concorde matter at their meeting of March 10, 1977 because, just three days prior to that meeting, the British and French had requested an opportunity for their technicians to present new noise abatement procedures to the Port Authority's technical staff and consultants. (See Exhibit A). And, as the United States' own brief here shows, it was not until April 14, 1977 that the FAA gave its comments on the new noise abatement procedures (Brief for the United States, Appendix B).

The question of where the responsibility lies for the postponement by the Port Authority of a decision on Concorde landing rights is another disputed factual issue which likewise cannot be resolved by this Court on this motion for summary judgment. However, because the matter is gratuitously raised by the United States, this Court should be made aware that the Port Authority expressly raised the matter of current federal policy with respect to the Concorde by letter dated January 31, 1977, attached to this brief as Exhibit B. No response was made to that letter.

In the light of the foregoing, we respectfully ask this Court to disregard that portion of the Brief for the United States which goes beyond the issues which can properly be

considered on this appeal.

Respectfully submitted,

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New York, New York
June 8, 1977

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TWX 7105815057 PA NYNJ NYK
NL WASHINGTON DC MAR 7 1977
MR P. J. FALVEY, GENERAL COUNSEL
THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY
1 WORLD TRADE CENTER
NEWYORK NY

U MAR7 MARCH 1977

THE AIRLINES REAFFIRM IN THE STRONGEST POSSIBLE WAY THAT IT HAS BEEN INDISPUTABLY DEMONSTRATED BY THE MANUFACTURER'S TESTS AT TOULOUSE AND CASABLANCA THAT CONCORDE CAN MEET THE PORT AUTHORITY NOISE REGULATIONS FOR OPERATIONS AT KENNEDY AIRPORT AS THEY ARE APPLIED TO ALL OTHER AIRCRAFT.

NEVERTHELESS, WE ARE CONCERNED THAT THE INFORMATION AVAILABLE TO THE PORT AUTHORITY MAY NOT PRESENT AN ADEQUATE PICTURE OF HOW THE AIRLINES WOULD OPERATE AT KENNEDY AIRPORT TO MINIMIZE NOISE OVER THE COMMUNITIES. NOISE ABATEMENT PROCEDURES FOR CONCORDE, AS FOR ALL AIRCRAFT, ARE DEVELOPED FOR THE SPECIFIC AIRPORT TO BE SERVED AND ACCORDING TO THE LOCATION OF SURROUNDING COMMUNITIES. AT DULLES AIRPORT THE NOISE ABATEMENT PROCEDURES HAVE BEEN ADAPTED TO MINIMIZE THE NOISE IMPACT ON THE COMMUNITIES IRRESPECTIVE OF THE RESULTS AT THE FAR 36 MONITORING POINTS.

AT KENNEDY AIRPORT THE AIRLINES BELIEVE THAT CONCENTRATING THEIR TAKEOFF OPERATIONS ON RUNWAYS 31L AND 22R, AT WEIGHTS SIGNIFICANTLY LOWER THAN MAXIMUM, WOULD SUBSTANTIALLY REDUCE THE NOISE IMPACT OVER THE COMMUNITIES SURROUNDING THE AIRPORT. MOREOVER, THE AIRLINES DO NOT INTEND TO USE RUNWAY 04L.

RUNWAY 13R WILL ONLY BE USED FOR TAKEOFF IN EXCEPTIONAL CIRCUMSTANCES EVEN IF THIS RESULTS IN ADDITIONAL OPERATIONAL CONSTRAINTS ON THE AIRLINES.

WE ARE CONFIDENT THAT SUCH AN APPROACH WILL PRODUCE SUBSTANTIALLY LESS THAN THE REQUIRED 112 PNDB AT THE MONITORING POINTS, AND WILL RESULT IN NOISE LEVELS OVER THE COMMUNITIES WHICH ARE OF THE SAME MAGNITUDE AS THOSE PRODUCED BY MANY LONG-RANGE SUBSONIC AIRCRAFT.

SINCE THIS IS A MATTER OF SUCH GREAT IMPORTANCE AND TECHNICAL ISSUES, IT MAY BE SUSCEPTIBLE TO MISUNDERSTANDING. WE WOULD APPRECIATE THE OPPORTUNITY TO HAVE OUR TECHNICAL PEOPLE MEET WITH THE CONSULTANTS AND TECHNICAL STAFF OF THE PORT AUTHORITY. WE STAND READY TO DO SO AT YOUR CONVENIENCE.

SINCERELY,

CHARLES E. GOODELL
COUNSELMINISTER OF TRANSPORT
REPUBLIC OF FRANCE

BEST COPY AVAILABLE

1023 EST

PA NYNJ NYK

NEWS from

THE PORT AUTHORITY
OF NY & NJ

One World Trade Center
New York, N.Y. 10048

Public Affairs Department
John Tillman, Director

For Information:
(212) 466-7777
(201) 622-6600 Ext. 7777

FOR IMMEDIATE RELEASE
March 7, 1977

As a result of a request received at 1:00 P.M. today from the French and British airlines requesting an opportunity for technicians to present new alternative noise abatement procedures to the Port Authority technical staff and consultants, the Port Authority Commissioners have postponed consideration of the Concorde matter from their Thursday, March 10 meeting to a later date.

The Port Commissioners stated that this action was taken in fairness to the British and French request and the importance of the issue. At the same time, the Commissioners emphasized that they will review any new data together with the data already assembled for its impact upon the people of the communities in the vicinity of Kennedy International Airport as well as the technical and economic considerations involved.

end

EXHIBIT A (2)

Printed on Recycled Paper

Concorde

PA NYNJ NYK

W TLTEX NYK
08052 0297 NL WASHINGTON DC 100 03-07 1977
DR WILLIAM J RONAN
CHAIRMAN
THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY
ONE WORLD TRADE CENTER
NEWYORK NY 10048

7 MARCH 1977
IN RESPONSE TO THE STATEMENT RELEASED BY THEXRXX THE PORT AUTHORITY THIS AFTERNOON, I WANT TO CONFIRM MY STATEMENT TO YOU TODAY THAT WE CANNOT ACCEPT ANY FURTHER POSTPONEMENT OF A DECISION ON LANDING RIGHTS FOR THE CONCORDF BY THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY.

THE FRENCH MANUFACTURERS OF THE CONCORDE AND OTHER FRENCH REPRESENTATIVES HAVE BEEN REPEATEDLY DENIED THE OPPORTUNITY TO MEET WITH THE PORT AUTHORITY'S TECHNICAL STAFF TO INSURE THAT THERE WAS NO MISUNDERSTANDING AS TO THE PROCEDURES TO BE FOLLOWED BY THE CONCORDE AT JFK.

THIS IS AN ISSUE OF MONUMENTAL IMPORTANCE TO THE FRENCH GOVERNMENT AND THE FRENCH PEOPLE. TECHNICAL MEETINGS HAVE BEEN REPEATEDLY REQUESTED TO DISCUSS SUCH MATTERS AS RUNWAY UTILIZATION AT JFK. THE REQUESTS WERE AIMED AT AVOIDING THE CALAMITOUS CIRCUMSTANCE OF A NEGATIVE DECISION BY THE PORT AUTHORITY BASED UPON AN ERRONEOUS UNDERSTANDING OF THE OPERATIONAL PROCEDURES TO BE FOLLOWED BY THE AIRLINES.

THE PORT AUTHORITY HAS AVILABLE TO IT ALL THE EVIDENCE NECESSARY TO MAKE A XXXX DECISION AT ITS MEETING ON THURSDAY, MARCH 10. IF THE ISSUE OF CONCORDE LANDING RIGHTS IS NOT DECIDED, WE WILL HAVE NO ALTERNATIVE BUT TO PURSUE THE MATTER IN U.S. DISTRICT COURT ON MARCH 15 AND WE INTEND TO DO SO.

THE FRENCH AND BRITISH GOGERNMENTS HAVE BEEN MORE THAN COOPERATIVE WITH THE PORT AUTHORITY IN GIVING IT TIME TO DO INDEPENDENT STUDIES AND TO REACH AN INDEPENDENT CONCLUSION SINCE WE DO NOT BEIEVE THE PORT AUTHORITY A HAS THE POWER TO DENY CONCORDE AT JFK AFTER THE U.S. GOVERNMENT HAS APPROVED SUCH LANDING RIGHTS OUR PATIENCE HAS RUN OUT.
SINCERELY
CHARLES E GOODELL
COUNSEL
MINISTER OF TRANSPORT
REPUBLIC OF FRANCE

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EXHIBIT A (3)

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THE PORT AUTHORITY OF NY & NJ

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March 9, 1977

Charles E. Goodell, Counsel
Minister of Transport
Republic of France
Washington, D. C.

Dear Senator Goodell:

Your telegram of March 7 to Dr. Ronan protesting postponement by the Port Authority of a decision for landing rights of the Concorde has been referred to me for reply.

As you know, the matter was scheduled for consideration by the Board of Commissioners on March 10. On March 7, you telegraphed a request for an opportunity to have "our technical people meet with the consultants and technical staff of the Port Authority" for the purpose of reviewing your proposal to ameliorate community noise impact by concentrating take-off operations on Runway 31L and 22R. Dr. Ronan conveyed that request to the Board then in session on March 7. Since the proposal required intensive review and the results of the review could not be brought to the Board in time for full consideration on March 10, the item was eliminated from the Board calendar for March 10. You were advised of the above and also that our staff was ready to meet as soon as possible with your technical people.

I should point out that on February 5, 1976, our staff requested K. Binning to provide "proposed take-off procedures for Runway 22R at JFK indicating gross weight limitations if any, thrust reductions if such were intended and directions of turn, plus noise levels over the Rockaways." There was no response.

Your telegram of March 7 was the first indication to the Port

EXHIBIT A (4)

Authority that the airlines would consider "weights significantly lower than the maximum" on various runways including 22R, and that the airlines do not intend to use Runway 4L. Further, we have great difficulty in perceiving any basis for your statement that the French manufacturers and other French representatives have been repeatedly denied the opportunity to meet with the Port Authority's technical staff. I know of only one such request and that was made last Friday, March 4. We immediately responded that we would consider your proposals if they were presented in memorandum form.

Your telegram of March 7 set forth the proposal in memorandum form but left open many questions including the extent of the proposed weight reductions, the turn procedure for 22R take-offs and exactly what would be the "exceptional circumstances" under which Runway 13R would be used.

You were advised that we would discuss these questions with your technical people as soon as possible. We agreed to meet with your technical people at two o'clock March 8. Your people later postponed the meeting to three o'clock March 9.

Of course, these discussions are without prejudice to our respective positions in the pending litigation and I have advised John Wells of the fact that they will be going on among our technical staffs.

Sincerely yours,

Patrick J. Falvey
General Counsel

cc: John Wells, Esq.

January 31, 1977

Dear Secretary Adams:

This is to inform you that the question of acceptability of Concorde supersonic aircraft operations at Kennedy International Airport will be discussed by the Port Authority's Board of Commissioners at its February 10 meeting.

The Board temporarily banned the Concorde last March 11 and directed that consultants be retained to study further the aircraft's noise characteristics and public reaction thereto. Based upon the consultants' findings, our staff will make its recommendations to our Board on or before that date. Information concerning the Concorde situation was transmitted earlier in some detail to Mr. William H.G. Fletcher, Carter/Mondale Transition Planning Group in a letter dated December 21, 1976 from A. Forbes Hubbach, Executive Director of the Port Authority. Since that time a hearing, scheduled for January 17, on the suit brought by Air France and British Airways challenging the Port Authority's right to impose its ban was postponed to February 16, 1977 at the airlines' request.

It has been pointed out to us that President Carter has expressed views on the Concorde in a June 16, 1976 speech before the Democratic platform committee and in an interview published August 22, 1976 as reported in the enclosed clippings. We are, of course, also aware of the Department of Transportation's commitment to reach a prompt determination on the question of continuation of Concorde flights following the conclusion of the trial period. During the course of the Concorde trial, your Department has monitored noise levels, the amount of stratospherical pollution, and community response. Should you believe that there are additional Federal policy or environmental considerations that the Port Authority should consider in its deliberations on this most important question, we would, of course, welcome and appreciate receipt of such information prior to February 10, 1977.

Sincerely,

William J. Ronan
Chairman

Hon. Brock Adams
Secretary of Transportation
U.S. Department of Transportation
400 Seventh Street, S.W.
Washington, D.C. 20590

Enc.

WJR/RHG:cc

EXHIBIT B

Copy received
June 8, 1977
William D Denson

COPY RECEIVED
6-8-77
ROGERS & WELLS
ATTORNEYS FOR

Copy Received
6-8-77 11:00 A.M.
William C. Clarke

COPY RECEIVED
DATE 6/8/77 HOUR 11:15
NICKERSON, [illegible], [illegible], [illegible], KAMIN & SOLL
BY Susan Conyon